(5)

No. 00-1255

Supreme Court, U.S.
FILED
MAY 3 2001
OFFICE OF THE CLERK

IN THE
Supreme Court of the United States

CHAMBER OF COMMERCE OF
THE UNITED STATES OF AMERICA,
Petitioner,

v.

HON. FRANK G. VOLLOR,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Mississippi

REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

JAN WITOLD BARAN
Counsel of Record
THOMAS W. KIRBY
WILEY, REIN & FIELDING
1776 K Street N.W.
Washington, DC 20006
(202) 719-7000

Of Counsel:

STEPHEN A. BOKAT
General Counsel
U.S. CHAMBER OF COMMERCE
1615 H Street, N.W.
Washington, DC 20062

MICHAEL B. WALLACE
PHELPS DUNBAR, L.L.P.
200 S. Lamar Street
Suite 500, Skytel Centre
Jackson, MS 39225

Counsel for Petitioner

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

12pp

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
DISCUSSION	1
CONCLUSION	9

TABLE OF AUTHORITIES

CASES	Page
Buckley v. Valeo, 424 U.S. 1 (1976)	7, 8
Edwards v. Hope Med. Group for Women, 512 U.S. 1301 (1994)	5
Graves v. Barnes, 405 U.S. 1201 (1972)	5
Mahan v. Howell, 404 U.S. 1201 (1971)	5
Morrow v. Vinson, 666 So. 2d 802 (Miss. 1995)	4
National Fire Ins. Co. v. Thompson, 281 U.S. 331 (1930)	6
New York Times Co. v. United States, 403 U.S. 713 (1971)	8
Pearson v. Columbus & Greenville Ry. Co., 737 So. 2d 390 (Miss. App. 1997)	4
Public Employees Ret. Sys. of Miss. v. Hawkins, No. 97-IA-01214-SCT, 2001 WL 324118 (Miss. Apr. 4, 2001)	4
Rostker v. Goldberg, 448 U.S. 1306 (1980)	5
Shuttlesworth v. Birmingham, 394 U.S. 147 (1969)	6

STATUTES	
Miss. Code Ann. § 23-15-801 (2000)	7
Miss. Code Ann. § 23-15-809 (2000)	7
Miss. Code Ann. § 23-15-1021 (2000)	7
Miss. Code Ann. § 97-13-15 (2000)	7

DISCUSSION

Petitioner Chamber of Commerce of the United States of America ("Chamber") hereby replies to the Brief In Opposition To The Petition For Writ Of Certiorari submitted by Respondent Judge Frank G. Vollor. Respondent does not contest that the two issues presented by the Petition merit this Court's attention. Instead, Respondent asserts (at 10-11) that technical obstacles preclude review in this case and, in any event, this Court should wait for "a different case on a better record." To the contrary, the supposed technical obstacles do not exist and this record is fully adequate to decide the two legal issues presented by the Petition.

1. Respondent confirms (at 10 & n.7) that Mississippi courts granted a series of temporary restraining orders ("TROs") that banned Petitioner's political speech during the final days of the 2000 election of justices to the Mississippi Supreme Court.[1] Respondent agrees (at 3) that Petitioner asked the Mississippi Supreme Court to stay TRO #1, and that the stay motion was denied (Pet. App. 1a). This Court,

---

[1] On Friday, November 3, 2000, Frank G. Vollor was granted a TRO from the Chancery Court of the First Judicial District of Hinds County, Mississippi ("TRO #1") (Pet. App. 2a). On Saturday, November 4, 2000, Oliver E. Diaz, Jr. was granted a TRO from the Chancery Court of Harrison County, Mississippi ("TRO #2") (Pet. App. 57a). On Sunday, November 5, 2000, Billy Joe Landrum was granted a TRO from the Chancery Court of the First Judicial District of Jones County, Mississippi ("TRO #3") (Pet. App. 60a). On Monday, November 6, 2000, Circuit Justice Antonin Scalia stayed TRO #1 (Pet. App. 5a). The same day, William A. Pyle, who was aware of Justice Scalia's stay of TRO #1 (Pet. 10), applied for and received a TRO from the Chancery Court of the First Judicial District of Hinds County, Mississippi ("TRO #4") (Pet. App. 62a). The Chancery Court that granted TRO #4 was aware of Justice Scalia's stay of TRO #1 as well (Pet. 10). Justice Scalia also stayed TRO #2 and TRO #3 on Monday, November 6, 2000 (Pet. App. 6a). On Tuesday, November 7, 2000, Justice Scalia stayed TRO #4 (Pet. App. 7a).

acting through Circuit Justice Antonin Scalia, then issued a series of stays of that TRO and three additional TROs (Pet. App. 2a-7a). Respondent confirms (at 10 n.7) what it terms the "unfortunate" fact that TRO #4, which was sought by Respondent's then-counsel, was issued in the face of this Court's first stay.

2. Respondent questions (at 6) whether the Petition challenges a final judgment, noting that the Mississippi Supreme Court's order was interlocutory in form and denied the stay without explicitly addressing Petitioner's simultaneously filed petition for interlocutory review.

a. Respondent does not deny, however, that TRO #1 and the Mississippi Supreme Court's ruling that the stay petition was "without merit" (Pet. App. 1a), gave Respondent all of the relief that he sought—suppression of Petitioner's speech until after the election. Respondent does not claim that he seeks any further relief or that there is anything more of substance to be done in the case. Nor could Respondent make such a claim since, in Respondent's view (refuted below), the entire case became moot and entirely unreviewable when the election occurred. Respondent does not deny that an order that grants the plaintiff all the relief he seeks is final. *See* Pet. 2 n.2.

b. Respondent notes (at 6) that the Mississippi Supreme Court failed to rule on the petition for interlocutory review. However, the purpose for that petition was to assure that the motion for stay would be considered if the Mississippi Supreme Court elected to view the TRO as nonfinal. By reaching and deciding the stay motion on the merits without addressing the request for interlocutory review, the Mississippi Supreme Court treated TRO #1 as final and, hence, rendered moot the petition for interlocutory appeal. Significantly, Respondent has never bothered to

respond to the petition during the six months since the stay was denied.[2]

3. Moreover, at issue here is a prior restraint on speech. Respondent acknowledges (at 7) that this Court repeatedly has reviewed temporary injunctions, even when the only action of the highest state court was to deny a stay. Respondent argues that, in such cases, this Court has focused its review on the propriety of the denial of the stay. That is an overstatement of the cases and, moreover, overlooks the truly final nature of the action challenged here. The two issues raised by the present petition both go to the propriety of the stay. The Petition contends that the Mississippi Supreme Court should have stayed the TRO (or reversed it outright) because (a) both on its face and when viewed in light of the supporting application, the TRO violated the First Amendment's prohibition of prior restraints, and (b) the TRO rested on a fundamental and obvious misunderstanding of the "express advocacy" standard under the First Amendment.

4. As an alternative to a claim that the Mississippi courts still are processing this case, Respondent asserts (at 9-11) that the case is moot. Respondent denies (at 10) that this Court's authority to review matters capable of repetition while evading review is implicated, arguing that the appeal of TRO #3 to the Mississippi Supreme Court demonstrates that review is available. However, *if this case is moot, then so is that*

---

[2] Respondent concedes (at 5 n.2) that, on March 2, 2001, the Mississippi Supreme Court denied a motion to dismiss petitioner's appeal of TRO #3. The motion to dismiss was based on the same theory of non-finality that Respondent advances here. By rejecting those grounds, the Mississippi Supreme Court confirmed that the TROs were final, making moot any petition for interlocutory review. Respondent's assertion (*id.*) that the Mississippi Supreme Court is holding the petition for interlocutory review pending the outcome of that other case is unsupported, unexplained, and untenable. The fact is that that petition has been regarded (even by Respondent) as moot.

appeal. If this case is moot, then prior restraints issued in the last weeks or even months of an election regularly will escape review. Importantly, there is no reason to fear a lack of vigorous adversarial argument.[3] Respondent is represented by experienced counsel. The state of Mississippi has appeared through its Attorney General in support of Respondent, and other groups have indicated their intent to do likewise. Indeed, because this case arose from a judicial election, there is likely to be widespread interest and amicus participation.[4]

5. Seeking to turn a lemon into lemonade, Respondent argues (at 1, 4, 11-13) that the record is inadequate for review because it consists solely of "the uncontested factual allegations in affidavits from the respondent and his attorney." Respondent overlooks that the *Moore* opinion issued by the United States District Court for the Southern

---

[3] Incredibly, Respondent asserts (at 9) that a denial of *certiorari* will not embolden trial courts who will be deterred from future TROs by "Justice Scalia's stay." Yet that stay did not receive much deference in Mississippi, even from Respondent's own counsel, as Respondent concedes (at 10 n.7). Respondent also asserts (at 12-13) that the Fifth Circuit appeal of *Moore* will solve any dispute. However, Mississippi's Supreme Court has made very clear that Mississippi courts are not subject to the Fifth Circuit. *Morrow v. Vinson*, 666 So. 2d 802, 805 (Miss. 1995); *Pearson v. Columbus & Greenville Ry. Co.*, 737 So. 2d 390, 397 (Miss. App. 1998).

[4] The need for Supreme Court review is underscored by the unique complexities inherent in elected judges reviewing cases that implicate their own or their colleagues' elections. Four of Mississippi's nine Supreme Court justices were up for election this last cycle, and the Chamber ran ads with respect to the races for all four seats. No doubt the Mississippi court has mechanisms for dealing with cases that affect the interests of a large number of justices. *E.g.*, *Public Employees Ret. Sys. of Miss. v. Hawkins*, No. 97-IA-01214-SCT, 2001 WL 324118 (Miss. Apr. 4, 2001) (appointment of a panel of five Special Justices to consider retirement benefits of former justices). Nonetheless, the state's institutions certainly will face unusual challenges.

District of Mississippi (Pet. App. 8a-33a), also is in the record and was relied upon in granting the TRO. The record is fully adequate to permit review of the two issues tendered by the petition.

a. To begin with, the fact that four prior restraints were issued with little evidentiary basis strongly underscores the need for this Court to clearly and firmly disapprove of such practice. This Court does not need to seek out a complex factual record and immerse itself in minutiae to be able to give clear guidance in this area. Nor, given typical TRO practice, is there any reason to expect that a longer record will present itself any time soon.[5] Indeed, demanding a more elaborate record would have perverse consequences. This Court and its Justices may grant stays of prior restraints only upon a conclusion that a grant of certiorari is likely. *See Edwards v. Hope Med. Group for Women*, 512 U.S. 1301, 1302 (1994) (Scalia, Circuit Justice); *see also Rostker v. Goldberg*, 448 U.S. 1306, 1308 (1980) (Brennan, Circuit Justice) (citing *Graves v. Barnes*, 405 U.S. 1201, 1203-04 (1972) (Powell, J., in chambers); *Mahan v. Howell*, 404 U.S. 1201, 1202 (1971) (Black, J., in chambers) for the proposition that "it must be established that there is a 'reasonable probability' that four Justices will consider the issue sufficiently meritorious to grant certiorari"). If this Court were to confine its review to prior restraints that are supported by a voluminous record, state courts and practitioners considering a prior restraint would have a strong incentive to act upon as little evidence as possible, thus thwarting this Court's ability to grant a stay.

---

[5] The record on appeal of TRO #3 to the Mississippi Supreme Court is no more developed than the present record. Respondent does not assert otherwise. Moreover, that stay was issued without reasonable notice and relied upon a different state statute. In addition, the federal issues raised here may not even be addressed in that appeal. The two cases have their own separate foci, this case on federal issues, the other on local practice questions.

b. The second issue presented here is a pure question of law—whether the theory of "express advocacy" announced in *Moore* and adopted as the fundamental predicate for the TRO conforms to the holdings of this Court.[6] No detailed facts are needed to decide that question. All that is necessary is to lay *Moore*'s analysis, which was adopted by the Chancery Court, alongside this Court's precedent. *Moore* recites the facts in some detail. Respondent complains (at 4, 12) that the record here contains only *Moore*'s descriptions of the Chamber's ads, rather than actual copies. Respondent does not allege that *Moore*'s descriptions are inadequate or inaccurate. But beyond that, the ads were widely disseminated. Copies are on file in the *Moore* record, and this Court may take judicial notice of the ads. *See Shuttlesworth v. Birmingham*, 394 U.S. 147, 157 (1969); *National Fire Ins. Co. v. Thompson*, 281 U.S. 331, 336 n.1 (1930) (cases cited therein). Indeed, at the request of either Respondent or this Court, Petitioner will lodge videotaped copies.

6. Respondent argues that the prior restraint issued here is unique, and does not merit this Court's attention. Respondent asserts (at 2) that the TRO was based on a "definitive" federal court ruling, the *Moore* opinion. This argument is untenable. The *Moore* opinion was clear that it rested on a minority view of the law and, indeed, on a view that had been rejected by "the First, Second, Fourth, and Eighth Circuits" (Pet. App. 23a). Needless to say, that theory had no support in Mississippi jurisprudence. Thus, even if *Moore* had been a final judgment, other courts could not fairly regard its conclusions as "definitive."

---

[6] An *amicus* brief submitted by certain organizations from Ohio further confirms the existence of widespread legal confusion on this point. *See* Motion For Leave To File And *Amici Curiae* Brief Of Alliance For Democracy And Common Cause/Ohio Respecting Certiorari.

7. Moreover, *Moore* did not reach the conclusion that Respondent cites. Respondent claims (at 3) that *Moore* established that the Chamber had "purchased advertising in amounts far exceeding the corporate amounts permitted under Mississippi law." This simply is not so.

a. To begin with, *Moore* quite clearly did not purport to decide that the Chamber was subject to any spending limit or had violated any spending limit. The defendants in *Moore* contended only "that these advertisements constitute '*independent* expenditures' subject to the *reporting* requirements of Mississippi Code Annotated §§ 23-15-801(j) and 809" (Pet. App. 12a, 17a) (emphasis added). *Moore* ruled only that the Chamber's ads were the type of speech that would require it to comply, at some point, with Mississippi's registration and disclosure requirements (Pet. App. 33a). *Moore* concluded that the Chamber's speech was of the type *regulated by Mississippi law, but it never concluded that the speech violated any requirement of Mississippi law* (*Id.*).

b. Indeed, contrary to Respondent's claim, Mississippi law imposes no limit on spending by corporations for *independent* political speech, even if the speech contains express advocacy.[7] For such independent speech, Mississippi requires only registration and disclosure. Indeed, the Mississippi Attorney General has flatly stated as much. *See* Brief Of The State Of Mississippi, *Amicus Curiae*, In Opposition To The Petition For Writ Of Certiorari at 8.[8]

---

[7] Respondent cites (at 3) Mississippi Code Annotated § 23-15-1021, concerning elections to judicial office. That provision limits direct and indirect contributions (Pet. App. 47a). Respondent also cites (at 3) § 97-13-15, which restricts "political contributions by corporations" (Pet. App. 47a). As this Court knows, independent expenditures are much different than contributions. *See Buckley v. Valeo*, 424 U.S. 1, 46-47 (1976).

[8] In the pending appeal to the Fifth Circuit from the *Moore* ruling, Mississippi's Attorney General explicitly states in his brief (at 17) that "independent expenditures are not subject to a dollar limitation."

Moore expressly noted that the Attorney General and Secretary of State did not question that the Chamber's spending was independent (Pet. App. 9a). No contrary evidence was submitted in support of the TRO. Respondent's assertion (at 13) that Petitioner "has not disputed in this Court" that it "far exceeded" Mississippi in spending limits is both inaccurate and misleading, in that no such limits apply to independent corporate speech.

c. The TRO here was not limited to particular ads that had been held to be subject to a spending limit. It forbade airing any "television advertisement, which is paid for or produced by the Chamber . . . concerning the Central District election" (Pet. App. 4a). Even if the Chamber were foreclosed from further "express advocacy," there was no basis for forbidding other non-express ads, should it choose to air them. In short, the entire issue of spending limits is irrelevant.

8. But more importantly, now that this Court has held in *Buckley* that political speech may be regulated in limited ways, it is vitally important for this Court to make clear that prior restraints are not a proper control mechanism. If a threat to the national security is not generally sufficient to justify a prior restraint on speech that will disclose material pilfered from the government, *New York Times Co. v. United States*, 403 U.S. 713 (1971), the risk that a speaker might pay for too much political speech cannot suffice.

CONCLUSION

The Petition properly presents two important legal issues that merit this Court's review. Certiorari should be granted.

Respectfully submitted,

JAN WITOLD BARAN
Counsel of Record
THOMAS W. KIRBY
WILEY, REIN & FIELDING
1776 K Street N.W.
Washington, DC 20006
(202) 719-7000

Of Counsel:
STEPHEN A. BOKAT
General Counsel
U.S. CHAMBER OF COMMERCE
1615 H Street, N.W.
Washington, DC 20062

MICHAEL B. WALLACE
PHELPS DUNBAR, L.L.P.
200 S. Lamar Street
Suite 500, Skytel Centre
Jackson, MS 39225

Counsel for Petitioner

May 3, 2001